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State v. Adams Appellant's Brief Dckt. 43791

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|--------------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 43791 |
| Plaintiff-Respondent, |) | |
| |) | CANYON COUNTY NO. CR 2006-6549 |
| v. |) | |
| |) | |
| CLAYTON ROBERT ADAMS, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |
| _____ |) | |

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

HONORABLE RENAE J. HOFF
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Clayton Adams appeals following the district court's denial of his motion for credit for time served. Mr. Adams asserts that the district court erred when it denied his motion requesting credit for time served on his aggravated battery sentence. When Mr. Adams was sentenced in 2007, the conviction for aggravated battery was ordered to be served consecutively to the conviction for second degree murder, but the sentence for second degree murder was subsequently vacated by the district court as part of Mr. Adams' post-conviction relief. When the sentence was vacated, the consecutive nature of his sentences ended as there was no sentence to which the aggravated battery could be consecutive. At Mr. Adams' re-sentencing on the second degree murder charge in 2014, the district court did not specify whether the new second degree murder sentence was consecutive to, or concurrent to, the aggravated battery charge. Thus, the sentences are concurrent and Mr. Adams is owed credit for time served for the aggravated battery conviction.

Statement of the Facts & Course of Proceedings

In 2007, Mr. Adams was charged by Information with the following crimes: 1) one count of first degree murder committed in the course of a felony, or alternatively, through premeditation; 2) one count of aggravated battery; and 3) three counts of attempted robbery. (R.34220, pp.27-31.)¹ The case proceeded to a jury trial.

¹ This Court took judicial notice of the transcripts and record from Mr. Adams' appeal in S.C. Docket No. 34220 and augmented the record on appeal to include the Clerk's Record, Reporter's Transcripts and Exhibits filed in prior appeal No. 42667. For ease of

(R.34220, pp.112-156.) The jury ultimately acquitted Mr. Adams of all three counts of attempted robbery, acquitted him of the murder in the first degree charge under both theories, found him guilty of the lesser charge of second degree murder, and found him guilty of aggravated battery. (R.34220, pp.157-161.)

On May 8, 2007, the district court sentenced Mr. Adams to life, with twenty-five years fixed, for the second degree murder and to ten years, with three years fixed, for the aggravated battery. (5/8/07 Tr., p.112, L.24 – p.113, L.13; R.34220, pp.172-173.) The aggravated battery charge was ordered to be served consecutive to the second degree murder charge, for an aggregate sentence of life, with twenty-eight years fixed. (5/8/07 Tr., p.113, Ls.7-13; R.34220, pp.172-173.) The district court entered a written judgment of conviction which provided that Mr. Adams' sentences on each count "to run consecutively." (R., p.34; R.34220, pp.172-173.)

In 2010, Mr. Adams filed a post-conviction petition. (R.42920,² pp.12-1473, 1641-1694.) The district court partially granted Mr. Adam's petition for post-conviction relief, finding Mr. Adams had been misinformed as to the possible penalties for second degree murder. (R.42920, pp.1894-1895 (incorporating the oral findings of fact and conclusions of law made during hearing on 6/23/14 Tr.); R. 42667, pp.34-36, 45-47, 116-117.) The district court's summary dismissal and re-sentencing orders vacated Mr. Adams' sentence on the second degree murder, and the district court set a re-sentencing hearing. (R.42920, pp.1894-1895, 1908-1909, 1933; 6/23/14 Tr., p.82, L.23

reference, the record in each underlying appeal will be cited herein as "(R.34220, p.)" or "(R.42667, p.)." (R., p.75.)

² Mr. Adams filed a motion asking this Court to take judicial notice of its file in the appeal in his post-conviction case, *Adams v. State*, S.C. Docket No. 42920. References herein to documents in the Clerk's Record shall be to "(R.42920, p.)."

– p.84, L.6; p.87, Ls.8-24.) On October 15, 2014, the district court re-sentenced Mr. Adams on the second degree murder to life, with twenty-five years fixed. (10/15/14 Tr. p.99, Ls.1-5.) At the re-sentencing, the district court was silent on whether the sentence was to be served concurrent with the aggravated battery sentence or consecutive to the aggravated battery sentence. (10/15/14 Tr.) The written Amended Judgment of Conviction on the second degree murder did not specify concurrent or consecutive service of the sentence, but provided, “IT IS FURTHER ORDERED that the sentence previously imposed on May 8, 2007, with regards to the charge of Aggravated Battery in Count II, and as set forth in the Judgment and Commitment filed May 15, 2007, shall remain as reflected in said judgment.” (R., p.32.) Mr. Adams timely appealed and asserted on appeal that his sentence was excessive. (R.42667, pp.131-134.) The Idaho Court of Appeals affirmed the sentence in an unpublished opinion, *State v. Adams*, 2015 WL 4740372 (Ct. App. 2015).

On November 2, 2015, Mr. Adams filed a Motion for Credit for Time Served and a supporting memorandum in which he asserted that he should receive credit for all of the time served on both of the two counts for which he was convicted. (R., pp.25-65.) Mr. Adams asserted that when he was re-sentenced on the second degree murder conviction, the district court did not make the sentence consecutive thus it was concurrent and he was entitled to credit for the time he spent in custody. (R., pp.25-65.) Alternatively, Mr. Adams asked that the Judgment be corrected pursuant to I.C.R. 36, as a clerical error. (R., p.25.)

The district court denied Mr. Adams’ motion without a hearing. (R., pp.66-67.) The district court denied Mr. Adams’ motion, seeking “to void or correct his sentence for

Aggravated Battery.” (R., p.66.) The district court held that because Mr. Adams was never granted post-conviction relief consisting of a re-sentencing on the charge of Aggravated Battery, there was no merit to his reliance on *State v. Drier*, 139 Idaho 246 (Ct. App. 2003). Mr. Adams filed a Notice of Appeal timely from the district court’s order denying his motion. (R., pp.68-69.)

ISSUE

Did the district court err when it denied Mr. Adams' motion for credit for time served?

ARGUMENT

The District Court Erred When It Denied Mr. Adams' Motion For Credit For Time Served

A. Introduction

Mr. Adams asserts that the district court erred when it denied his request for credit for time served. Although Mr. Adams' sentence on the conviction for aggravated battery was initially ordered to run consecutively to the conviction for second degree murder when he was sentenced in 2007, the first sentence for second degree murder was vacated, thus the consecutive nature of his sentences vanished where there was no sentence to which the aggravated battery could be consecutive. Upon his resentencing in 2014, the district court did not specify that the second degree murder was consecutive to the aggravated battery, thus, the sentences are concurrent. Mr. Adams respectfully requests that this Court remand the case with an order for the district court to issue a corrected Amended Judgment of Conviction which clarifies that the sentences are to be served concurrently and which gives Mr. Adams the requisite credit for time served on the aggravated battery.

B. Standard Of Review

A determination as to "[w]hether the district court properly applied the law governing credit for time served is a question of law over which" appellate courts exercise free review. *State v. Covert*, 143 Idaho 169, 170 (Ct. App. 2006). On appeal, the appellate court will "defer to the district court's findings of fact, however, unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous." *Id.*

C. The District Court Erred When It Denied Mr. Adams' Motion For Credit For Time Served

In 2007, Mr. Adams' sentence on the conviction for aggravated battery was ordered to be served consecutively to the conviction for second degree murder. (5/8/07 Tr., p.112, L.24 – p.113, L.13.) In 2013, the first sentence for second degree murder was vacated by the district court's summary dismissal and re-sentencing orders as part of Mr. Adams' petition for post-conviction relief (R.42920, pp.1894-1895, 1908-1909, 1933), whereupon the consecutive nature of his sentences vanished as there was no sentence to which the aggravated battery could be consecutive. When Mr. Adams was re-sentenced for the second degree murder charge in 2014, the district court did not specify whether the new second degree murder sentence was consecutive to, or concurrent to, the aggravated battery charge. (10/15/14 Tr., p.99, Ls.1-7.) Because the second degree murder sentence was imposed after the aggravated battery sentence, the only way the sentences could be consecutive is if the district court said so during its oral pronouncement at the re-sentencing. However, while the district court did attempt to incorporate the aggravated battery sentence into the 2014 written Amended Judgment of Conviction (R.42667, p.130; R., p.32), this was ineffective for the reasons discussed below. Because the aggravated battery charge had ceased to be consecutive once the second degree murder was vacated, and because such an incorporation was contrary to the oral pronouncement of sentence, the sentences are concurrent and Mr. Adams is owed credit for time served for the aggravated battery conviction.

1. The Consecutive Nature Of The Aggravated Battery Ceased Once The Second Degree Murder Sentence Was Vacated For Re-Sentencing

In 2007, the district court first imposed the sentence for second degree murder and then sentenced Mr. Adams on the aggravated battery conviction. (5/8/07 Tr., p.112, L.24 – p.113, L.13; R., pp.33-34.) The district court ordered the aggravated battery sentence be served consecutively to the second degree murder sentence. (5/8/07 Tr., p.112, L.24 – p.113, L.13; R.42667, p.62.) The sentence for second degree murder was subsequently vacated by the district court's orders after Mr. Adams prevailed on two of his post-conviction claims. (R.42920, pp.1894-1895, 1908-1909, 1933.) When the first sentence, the one that the aggravated battery sentence was consecutive to, vanished, so did the consecutive nature of the aggravated battery sentence. A consecutive sentence must be tied to, or consecutive to, another sentence.

Similar to the facts of *State v. Teal*, 105 Idaho 501, 505 (Ct. App. 1983), Mr. Adams' Amended Judgment of Conviction incorporated the aggravated battery sentence from the original Judgment of Conviction, and, like the *Teal* Court, this Court should find that phrases within a Judgment dictating a legally impossibility are surplusage and should be stricken to avoid confusion. As the *Teal* Court found:

Thus, once one sentence had been imposed, the court was free to exercise its discretion by ordering the second sentence to be served consecutive to the first. Here, however, the district court, in the original judgment and sentence in each case, made each sentence consecutive to the other. As noted at the outset of this opinion, the forgery sentence (Docket No. 1024) was the first pronounced. At that point, there was no other sentence to which the term "consecutive" could apply. Therefore, the phrase "said five (5) year term is to run consecutively with the sentence in Minidoka County Case No. 1026" is surplusage and should be stricken to avoid confusion.

Teal, 105 Idaho at 505.

A period of incarceration cannot be ordered consecutive to a sentence that had not yet been pronounced, or had been pronounced but vacated, or even pronounced but reversed. In *Blitz v. United States*, 153 U.S. 308, 317-18 (1894), a term of imprisonment under a judgment on the third count of an indictment was stipulated to commence upon the expiration of the judgment on the first count, and the judgment on the first count was reversed because of error. The United States Supreme Court held that the term of imprisonment on the third count should commence on the date imprisonment to begin on the first count. *Blitz*, 153 U.S. at 317-18; see also *Kite v. Com.*, 52 Mass. 581, 585 (Mass. 1846) (holding that a consecutive sentence is legal; and “[i]f the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then, by its terms, the [subsequent] sentence in question takes effect, as if the previous one had expired by lapse of time.”)

The sentence on the second degree murder was vacated. When it was vacated for re-sentencing, the second sentence for aggravated battery became the only sentence. It could thusly not be served consecutive to any other sentence, for no other sentence existed.

2. Upon Mr. Adams’ Re-Sentencing, The Second Degree Murder Sentence Was Concurrent To The Aggravated Battery Sentence

Mr. Adams’ second degree murder sentence is concurrent with the aggravated battery sentence where, at re-sentencing, the district court did not specify whether the second degree murder sentence was to be served concurrently with or consecutive to any other sentence, thus, the second degree murder sentence could only be concurrent.

Idaho case law holds that if the trial court does not specify whether a sentence is to be served concurrently or consecutive to another sentence, the sentence will be concurrent. *State v. Bosier*, 149 Idaho 664 (Ct. App. 2010).

In *State v. Allen*, 144 Idaho 875 (Ct. App. 2007), the Idaho Court of Appeals held:

Under Idaho law, “the only legally cognizable sentence in a criminal case is the ‘actual oral pronouncement in the presence of the defendant.’ The legal sentence consists of the words pronounced in open court by the judge, not the words appearing in the written order of commitment.”

Id. 144 Idaho at 877-878 (internal citations omitted) (holding that, where the sentence in the amended judgment did not comport with the sentence pronounced at the sentencing hearing, the oral pronouncement controlled and the district court’s contrary intent did not).

The subsequent Amended Judgment and Commitment provided “that the sentence previously imposed on May 6, 2007, with regards to the charge of Aggravated Battery in Count II, and as set forth in the Judgment and Commitment filed May 15, 2007, shall remain as reflected in said judgment.” (R., p.32.) However, the district court’s attempt to integrate the previously imposed sentence was ineffective for two reasons: (1) the oral pronouncement controls, thus, any attempt to modify the sentences by correcting or altering the sentences in a written order was invalid; and (2) in order to have the sentences be consecutive, the district court was required to make the later-imposed sentence (the second degree murder) consecutive to the sentence imposed first (the aggravated battery) once the sentence was orally pronounced on the defendant.

In *State v. Searcy*, the Idaho Court of Appeals held that the oral pronouncement of a corrected sentence did not prevail over a subsequent written recitation of the

sentence that was consistent with the original sentence. 124 Idaho 107, 112 (Ct. App. 1993). However, in *Searcy* the hearing was held to correct a defect in the sentencing by rescinding one of the two sentencing enhancements, not to sentence the defendant anew. *Id.* Thus, it is distinguishable from the facts of Mr. Adams' case, where the district court vacated the sentence on the second degree murder charge, and then sentenced Mr. Adams anew. That is, once the second degree murder charge was vacated, the aggravated battery was consecutive to nothing. It was therefore no longer a consecutive sentence, it was concurrent. His resentencing in 2014 could not alter the nature of the aggravated battery sentence.

Where the district court did not specify that the second degree murder was consecutive to the aggravated battery the oral pronouncement controls, and the sentences are concurrent.

3. Mr. Adams Is Entitled To Credit For Time Served On The Aggravated Battery Since His 2007 Sentencing

When the aggravated battery sentence that was initially ordered to be served consecutive to the second degree murder sentence became concurrent, the aggravated battery sentence became wholly concurrent from the date the sentence was imposed in 2007. Thus, credit is owed to Mr. Adams' aggravated battery sentence from approximately 2007 to present because a sentence cannot be partly consecutive and partly concurrent.

"A sentence is *either* consecutive to or concurrent with another sentence, but never both. A singular sentence simply cannot be partially concurrent and partially consecutive to another sentence." *Mickelsen v. Idaho State Corr. Inst.*, 131 Idaho 352,

355 (Ct. App. 1998) (emphasis in original) (holding that district court's modification of defendant's sentences from being served consecutively to concurrently applied retroactively to date sentences were imposed, and thus, defendant was entitled to have credit for time served applied to sentences as though they were concurrent when originally imposed).

In *Mickelsen*, the district court modified the defendant's sentences from consecutive to concurrent; however, the Idaho Department of Correction failed to alter its credit for time served calculation to reflect the district court's modification. *Mickelsen v. Idaho State Corr. Inst.*, 131 Idaho 352 (Ct. App. 1998). The Idaho Court of Appeals held that the Department had to treat Mickelsen's sentences as though they were imposed concurrently *ab initio*, i.e. as of May 30, 1991, and the time Mickelsen served in prison had to be credited to both offenses. *Id.* at 356. The Court reversed and remanded the case for recomputation of Mickelsen's credit for time served dating back to his original judgment of conviction.

Here, the facts show that Mr. Adams' sentences are concurrent, and that he is entitled to additional credit for time served on each count for which he received a sentence; thus, the district court erred when it denied his request for credit for time served. The supporting documentation submitted by Mr. Adams show he is entitled to nearly nine years of credit for time served on the aggravated battery charge. (R., p. 30.) This Court should hold that Mr. Adams is entitled to have his sentences treated as though they were imposed concurrently *ab initio*, i.e. as of May 8, 2007, and the time Mr. Adams has served in prison must be credited to both offenses. *Mickelsen*, 131 Idaho at 356.

Mr. Adams respectfully requests that this Court remand the case with an order for the district court to issue a corrected Amended Judgment of Conviction which clarifies that the sentences are concurrent and which gives Mr. Adams the corresponding credit for time served on the aggravated battery, approximately 3,333 days, or nine years and one month from the May 8, 2007 sentencing hearing to the date of this Appellant's Brief.

CONCLUSION

Mr. Adams respectfully requests that this Court order the Amended Judgment be corrected and that he be given credit against each sentence for all time he spent in custody.

DATED this 22nd day of June, 2016.

_____/s/_____
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of June, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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EVAN A. SMITH
Administrative Assistant

SJC/eas